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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications.	))))	I.93-12-007

APPLICATION OF
CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA
FOR REHEARING OF DECISION 94-08-022 AND REQUEST FOR STAY

Pursuant to Section 1731 and 1735 of the California Public Utilities Code and Rules 85 *et seq.* of the Commission's Rules of Practice and Procedure, Cellular Carriers Association of California ("CCAC") hereby applies for rehearing of the Commission's Decision 94-08-022, mailed August 4, 1994. ("Decision"). CCAC also requests that the Commission stay Ordering Paragraphs 1 through 7 of that decision pending rehearing by the Commission, any subsequent appeals, and review by the Federal Communications Commission ("FCC"). The members of the CCAC consist of the major owners and operators of cellular communications systems in California[1].

[1] American Cellular Communications, Atlantic Cellular Company, Bell South Cellular, Cal-One Cellular, Contel Cellular, GTE-Mobilnet, Lin Broadcasting, McCaw Cellular Communications, Airtouch, US West Cellular of California, and United States Cellular.

I.

INTRODUCTION

The CCAC urges the Commission to carefully reconsider its Decision 94-08-022. It appears that the Commission has adopted an extraordinarily abbreviated procedure to decide very important issues of regulation which will affect California's wireless telecommunication policy for years to come. In all likelihood, what has driven the Commission to this procedural extreme has been the perceived need to reach a decision in time to file a petition for retention of rate regulatory authority with the FCC. While the Commission has now filed such a petition, that does not negate the fact that the decision which authorized the filing of the petition is substantially flawed by procedural defects which have denied due process to parties, as well as errors of fact and law which undercut the Commission's reasoning for its Decision.

As discussed in detail below, the Commission and the parties to this proceeding have been poorly served by the decision to forego evidentiary hearings and to decide so many complicated policy issues on the basis of limited comments and a Commission-authored data request. The CCAC strongly urges the Commission to carefully review the recitation of factual and legal error in this application, and to make the proper response, which is to reconsider major portions of the Decision in conjunction with evidentiary hearings. Only in this way should such important regulatory decisions be reached, and the import of this decision for the wireless telecommunications industry is so great that it is

crucial that the Commission take the time to correctly resolve such issues as the rate regulation of facilities-based carriers and the unbundling of cellular radio networks.

II.

THE STANDARDS FOR REVIEW OF CPUC DECISIONS REQUIRE THAT A COMMISSION DECISION MUST CONTAIN SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MUST HAVE AFFORDED PARTIES SUFFICIENT DUE PROCESS

For any Commission decision to withstand the scrutiny of review, it must meet certain legal standards. First, California Public Utilities Code ("Code") section 1705 requires that the Commission's decision be supported by separately stated findings of fact and conclusions of law on all issues material to the decision. In California Manufacturer's Association v. Public Utilities Commission, 24 Cal.3d 251, at 258,("CMA") the Court annulled a CPUC decision adopting a rate methodology which was unsupported by findings or by evidence as to whether it would result in the intended objective of conserving more natural gas. The Court stated that "without some expert testimony or empirical data reflecting elasticity of need and demand for the various groups, it cannot be determined which plan will result in least usage." CMA at 259. Findings of fact and conclusions of law by the CPUC satisfy the requirements under §1705 when they are sufficient to support a determination that the Commission properly exercised authority and had not acted arbitrarily in imposing its order. Toward Utility Rate Normalization v. CPUC (1978) 149 Cal.Rptr. 692, 585 P.2d 491. ("TURN v. CPUC"). The Commission's Decision must afford a rational

basis upon which a reviewing court or affected party may fully understand the Commission's reasoning and to ensure that the Commission itself did not act carelessly or in an arbitrary manner. The California Supreme Court considers every issue that must be resolved to reach the Commission's ultimate conclusion material for the purposes of Section 1705. Greyhound Lines, Inc. v. PUC, 65 Cal.2d 811, 813 (1967); Southern Pacific Co. v. PUC, 68 Cal.2d 243, 244 (1968).

Furthermore, if the Commission relies upon evidence outside the record, its subsequent findings are not properly supported. TURN v. CPUC at 546-547 (1978) also see, California Portland Cement Co. v. Public Utilities Commission, 49 Cal.2d 171, 179 (1957). The Commission has also recognized that when competitive factors are potentially determinative in CPUC proceedings, the Commission has the responsibility to make and utilize appropriate findings sua sponte as noted in Telephone Equipment Corp. v. Pacific Telephone & Telegraph Co. (1973) 75 Cal.PUC 188 at 193. In that case, Telephone Equipment Corp. intended to attached a call patching devise directly to the network, but was precluded from doing so by Pacific Telephone unless a protective coupler device was also installed by Pacific Telephone. Despite both parties claims that there was no competition between them, the Commission, on its own motion,

nevertheless considered competitive factors since those factors were potentially determinative in the proceeding.[2]

The second standard which the decision must face is a basic requirement of due process of law, which includes both notice and a fair opportunity to be heard.[3] That requirement is in part embodied in §1708 of the Code, which permits the Commission to rescind, alter or amend its decisions only "upon notice to the parties" and an "opportunity to be heard as provided in the case of complaints." The Supreme Court in California Trucking Ass'n v. Public Utilities Com'n (CTA)[4] has interpreted that section to require that the Commission permit a party the opportunity to prove the substance of its position rather than the mere opportunity to submit written comments addressing a particular proposal. (CTA at 244).

III.

D.94-08-022 DOES NOT MEET THE APPLICABLE STANDARDS FOR REVIEW AND THE COMMISSION MUST GRANT A REHEARING ON ALL THE MAJOR ELEMENTS OF ITS DECISION

A. Specification of Legal Errors in D.94-08-022: Examined In The Light Of The Appropriate Standards Of Review, D.94-08-022 Constitutes Legal Error And Violates The Due Process Rights Of Cellular Carriers

D.94-08-022 fails to comply with the legal standards mandated by both California statute and case precedents. These

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[2] Id.

[3] See, e.g., Matthews v. Eldridge, 424 U.S. 319, 333 (1976); City of Los Angeles v. Public Utilities Commission, 15 Cal. 3d 680, 699-701 (1975)

[4] California Trucking Ass'n v. PUC, 137 Cal.Rptr. 190, 561 P.2d 280, 19 C.3d 240 at 244 (1977)

failings stem from a lack of procedural due process as well as substantive errors in the reasoning relied upon by the Commission. The net result is a failure on the part of the Commission to make appropriate findings and conclusions and a failure to assemble sufficient evidence upon which to base such findings and conclusions.

1. The Commission Failed To Provide For Hearings In This Investigation

As discussed in greater detail below, the Commission denied requests by cellular carriers to conduct essential hearings in this Investigation, thus denying those parties a fair opportunity to be heard so that carriers may prove the substance of their respective positions. Cellular carriers were also denied the opportunity to sufficiently respond to matters which were placed in the record, itself a denial of fundamental due process rights.

2. D.94-08-022 Fails To Contain Necessary Findings Of Fact And Conclusions Of Law

This application will demonstrate that the Commission failed to provide necessary findings of fact and conclusions of law in its interpretation of information from the record, thus failing to sufficiently support its ultimate orders in D.94-08-022. In addition, D.94-08-022 contains no findings regarding the impact of its Decision upon customers, nor appropriate findings and conclusion regarding the impact of its Decision upon cellular carriers.

In addition, as set forth in more detail below, the Commission has made numerous errors in reasoning and the

interpretation of facts, which errors result in a lack of sufficient findings and conclusions or evidence to support such findings or conclusions for purposes of due process.

3. D.94-08-022 Changes Prior Commission Decisions While Denying Cellular Carriers Due Process of Law

As more fully described below, D.94-08-022 repeatedly violates §1708 of the Code by failing to provide parties with proper notice and opportunity to be heard regarding the Commission's modification or abandonment of prior Commission findings and orders.

4. D.94-08-022 Relies On Facts Not Contained In The Public Record

The Commission's Decision also relies on facts not in the record and upon non-public information. Because parties were unable to examine and respond to that information, the Commission's reliance on such information is a violation of due process.

B. D.94-08-022's Adoption Of A Dominant/Non-Dominant Regulatory Framework, Established Absent Requisite Evidentiary Hearings And Premised On Numerous Errors Of Fact And Law, Renders The Decision Fatally Defective

1. Evidentiary Hearings Were Required To Address Fundamental Factual Issues Necessary In Determining Whether A Dominant/Non-Dominant Framework Is Appropriate

D.94-08-022 has adopted a dominant/non-dominant regulatory structure without resolving through hearing two principal factual issues. 1) What is actually happening to cellular

rates? and 2) What conclusions may the Commission logically draw from that information about the extent of cellular competition in California? In comments submitted in this Investigation, CCAC and other parties contended that both questions must be answered before the Commission can fairly proceed,[5] and demonstrated that the CPUC cannot implement the dominant/non-dominant regulatory framework without holding extensive hearings, as those comments have raised numerous material issues of fact which cannot be resolved under the notice and comment procedures of a rulemaking.[6]

Nevertheless, D.94-08-022 finds that the Commission does not need evidentiary hearings to address the market dominance of cellular carriers, the appropriateness of cost-of-service regulation, the unbundling of market-based rates or Extended Area Service (EAS re-rating practices).[7] Such a finding is in error, as the Commission is not at liberty to disregard those requests for hearing under the circumstances of this Investigation. The California Supreme Court notes that opportunity to be heard will be afforded when the party requests a hearing. (CTA at 244-245). The record in this Investigation is replete with demands for hearings on a variety of factual issues, which are addressed in greater detail below. For the Commission to deny those requests,

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[5] See e.g., Reply Comments of CCAC dated March 18, 1994 at 14-15; See also Reply Comments of Fresno MSA Limited Partnership, Contel Cellular of California, Inc. And California RSA No. 4 Limited Partnership dated March 18, 1994 at 13.

[6] Id.

[7] Decision, Finding of Fact (FOF) 4, at 88.

particularly in the face of such an important decision by the Commission, is a denial of party's procedural due process rights.

Not only does the absence of hearing deny due process, but it effectively renders the Commission's ultimate conclusions defective. Prior to implementing a policy for a cellular regulation, the Commission is required by Public Utilities Code section 1705 to base its decision on evidence and findings of fact sufficient to justify the proposal. That obligation would necessarily require hearings and the issuance of an order defining the criteria for determining what constitutes a dominant carrier and applying those criteria to each carrier's individual circumstances.

The Commission's rejection of requests for hearing in a major policy decision which establishes a new regulatory framework is extraordinary in recent major telecommunications proceedings.[8] Even if Commission precedents did provide for omission of hearings, such an omission would nevertheless be in violation of §1708 of the Code. As the Supreme Courted stated in CTA:

> In any event, the statutory provisions in section 1708 are so clear as to the necessity for a hearing that the commission's consistent failure to grant hearings in prior cases cannot be deemed determinative. CTA at 245.

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[8] See For example: Rulemaking Re Access To Bottleneck Services and To Establish A Framework For Network Architecture Development Of Dominant Carrier Networks, D.93-08-026; Alternative Regulatory Frameworks For Local Exchange Carriers, D.93-09-076 (Rescinded by D.93-10-033); New Regulatory Framework (NRD), D.89-10-031, D.94-06-011; In Re ATT For Removal of All Constraints On Taking Back The Billing Of its Services, D.94-05-021; Open Network Architecture ("ONA") Proceeding, D.89-10-031. Hearings were held in each of these proceedings.

It is worthy of note that when the Commission did conduct extensive hearings regarding the state of cellular competition, it reached a different conclusion than that reached in this Investigation. In I.88-11-040, the Commission allowed parties to present evidence and comment upon the proposals of their opponents. Based on that record, the Commission did not find that rates were unreasonable. The Commission's stated reliance upon the record established in I.88-11-040 is therefore somewhat perplexing, as the Commission managed to reach divergent conclusions on fundamental issues, absent additional hearings. The failure to conduct hearings in this proceeding is compounded by the undue restriction on parties' ability to respond which effectively denied such parties due process. Parties were able to submit only two rounds of comments, with page limitations, for the record. Given the scope of this Investigation, which effectively subsumed the entire wireless arena, that limited opportunity for input was grossly inadequate. The Commission itself recognized the inadequacy of parties opportunity to provide information for the record, as the Commission later sought supplemental information through data requests to various parties in the proceeding.[9] However, parties had no opportunity to comment upon that data. In fact, most parties to the proceeding were unable to even view that data since it was submitted to the Commission on a confidential basis pursuant

[9] See Administrative Law Judge Ruling of April 11, 1994 issued in the instant proceeding.

to General Order 66-C.[10] Thus parties are left with no means of testing whether the Commission's new policy is based on facts sufficient to justify the proposal.[11] Any opportunity for parties to voice comments and concerns was further squelched by a complete ban on all ex parte contacts in this proceeding imposed by the ALJ Ruling Dated July 21, 1994 in this matter. Thus, parties lost their opportunity to even informally relay their respective positions.

2. D.94-08-022 Adopts The Dominant/ Non-Dominant Framework On The Basis Of Unsupported Allegations

a. The Distinction Between Dominant and Non-Dominant Carriers Adopted by the Commission is Arbitrary And Capricious

Perhaps the arbitrary nature of the Commission's new framework is best seen in the manner in which dominant firms and nondominant firms are distinguished. The Commission grants nondominant status to any cellular license holder that demonstrates (through the application process) that it controls no more than 25% of the cellular bandwidth in a given market. Decision at 22. Yet the decision is completely void of justification for the 25% figure. Such a fundamental element of the decision must be supported by some facts, CMA, supra. The lack of any record evidence or rational explanation for this action reveals the arbitrary and capricious nature of the Commission's decision.

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[10] Decision at 6.

[11] CTA supra.

b. The Commission's Assertions Regarding The Effect of Cellular Ownership Are Unsupported

The Commission cites as "evidence of lack of price competition" the interlocking ownership among major carriers. Aside from that broad allegation, the Commission produces no evidence in support of its conclusion. The Decision merely states that "the pattern of interlocking ownership among major carriers" is another indication of the control cellular carriers exercise over the market and why competition cannot flourish at this time in the absence of regulatory oversight.[12] However, the Commission fails to provide any empirical evidence that California cellular carriers (or carriers anywhere, for that matter) have used cellular partnerships as a vehicle for anticompetitive behavior. Furthermore, the Commission has not found that cellular carriers are acting in concert to control cellular facilities. To the extent that the Commission's new framework relies on these unfounded allegations, they provide no basis to support the Commission's findings and conclusions.

c. D.94-08-022 Draws Unsupported Conclusions Regarding Capacity Utilization

The CPUC suggests that the carriers' high prices and profits confirm that the carriers have at times maintained excess capacity, and that they have at other times failed to invest in system expansion when it is economically justified.[13] This

[12] Decision at 19.

[13] Decision at 57-59

statement, however lacks any foundation to which parties may respond as the Commission provides no indication of what it believes are the appropriate patterns of capacity utilization and expansion in a competitive industry. In addition, the record reveals none of the data on capacity utilization upon which the CPUC relies for its conclusion of excess capacity. The parties are completely unable to respond to the Commission's conclusion in a meaningful way. This unsupported conclusion, at a minimum, points to the need for hearings on the issue of network capacity and its relation to reasonable rates.

d. The Commission's Assertion That Regulation Has Contained Cellular Rates Is Baseless

The Decision claims credit for the Commission's regulation in containing cellular rates, which have not risen in California as they have in some other states. The Decision, however, offers no evidentiary support for that self-serving conclusion. An equally plausible explanation is that vigorous carrier competition in California has held rates down. The unfounded conclusion that regulation has constrained rates should therefore be ignored as a basis for supporting the decision.

The Decision is also flawed for what it does not contain, that is, any findings or conclusions of law based on evidence in the record regarding whether the Commission's proposed increase in regulations for the wireless communications market will stifle innovation, stall technological change, or impede the development of competitive choices for California consumers. Cellular industry

parties have argued that such results would follow from CPUC regulation and the Decision has completely failed to address these issues. Any new framework must resolve these issues to reach the ultimate conclusion adopted by the Commission, and absent these elements, the decision is fatally flawed. See Greyhound Lines, Inc., supra.

e. The Commission Erred In Failing to Grant Hearings Regarding The Market Share of Cellular Carriers

As noted in comments filed in this Investigation, there are several ways to determine market share. The Reply Comments of Airtouch Communications summarized some of those various methods submitted in comments as including:

> minutes of use, capacity based on bandwidth and the type of technology (digital or analog), available spectrum, traffic on any function of a cellular network within a given market, subscribers, population coverage, wholesale revenues, number of mobile units, conversion minutes and industry revenues.[14]

That long list of disputed factors point to a lack of consensus regarding the appropriate indices for market share, and whether use of market share is even relevant to the wireless market. Such a number of disputed criteria for market share also highlights the need for hearings to explore this crucial factual issue. Nevertheless, the Commission reached its conclusions about the standards used to measure market share, and then applied those standards, without any hearings at all.

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[14] Reply Comments of Airtouch at 13.

The Decision also notes the divergent views concerning the appropriate assumptions to use in determining market share. For example, in computing the Herfindahl-Hirshchmann Index (HHI),[15] the Commission noted that the HHI computed by CCAC and CRA used different values and assumptions. The Commission concluded CRA's HHI estimates were more reliable than CCAC since CRA's values were based on "actual industry estimates"[16] The appropriate methodology for computing the HHI is a question of fact. Even if the Commission found that "actual industry estimates" were the appropriate values, then the those values should have been examined through the hearing process, as their accuracy is clearly a question of fact. Instead, the Commission applied the untested "estimates" presented by CRA. The selection and appropriate application of the indices, which form a central basis for the Commission's ultimate determination of market power, should have been subjected to hearings, as requested by parties,[17] and not based merely on values recommended by competitors of the cellular carriers. Hearings were essential to fix the criteria for determining market share and the existence or exercise of market power by cellular carriers. The Commission is required by §1705 of the Code to base its decision on evidence and findings of fact sufficient to justify the proposal. (CTA supra at 258). Absent

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[15] Decision at 31.

[16] Decision at 35.

[17] CCAC Reply Comments at 15. See Also Airtouch Reply Comments at 23.

hearings regarding market share, the Commission's determination that cellular carriers are "dominant" lacks the necessary support of the record (CTA, supra).

f. The Commission Finding That Cellular Carriers Control "Bottleneck Facilities" Is Based on Errors of Fact and Law.

The Commission errs in characterizing cellular carriers as controlling bottleneck facilities. "Bottleneck facility" is a term applicable only to a monopolist controlling an essential facility or to multiple providers acting in concert to control one such facility. See MCI Communications v. American Telephone and Telegraph Co., 708 F. 2d 1081, 1132 (7th Cir 1983) cert. denied, 464 U.S. 791 (1983). The Commission has not shown that there is control of a single facility, indeed, because there are two cellular carriers in each market, such could not be the case. The Commission itself acknowledges this. D.94-08-022 says a bottleneck

> generally exists where (a) an essential facility, product or service is controlled by one firm; (b) it would be economically infeasible for any other firm to duplicate the facility, product or service; and (c) access to that facility product or service is necessary for other firms to compete successfully. Decision at 21. (Emphasis added.)

The Commission then proceeds to dismiss a fundamental element of the definition, that is, that the service must be controlled by "one firm." The Decision accuses carriers of engaging in an argument over semantics when carriers point out that each market has not one, but two firms. The Commission states,

> We acknowledge cellular carriers' argument that, by

> definition, cellular carriers do not form a monopolistic bottleneck since there are two firms--not one--in each MSA. But the carriers essentially are engaging in an argument over semantics.... The presence of two carriers...may serve to mitigate, but does not eliminate...a bottleneck. Decision at 26.

On the contrary, it is the Commission which is engaging in semantic gymnastics and it is the Commission which has failed to provide any authority to support its spontaneous appropriation of law and policy relating to monopolies and its application to a market which is obviously no such thing. Additionally, the finding of bottleneck facilities contravenes the Commission's findings in its Phase I and II decision that "In the cellular industry, there is no bottleneck monopoly.... Decision 90-06-025 mimeo at 59. Reversal of that decision without notice and hearing is a violation of Section 1708 of the Public Utilities Code.

The Commission's application of the term is also inconsistent with the Commission's finding that cellular is not an essential service. The Commission specifically found that cellular is a discretionary service[18] - which is at odds with its conclusion that carriers control "essential bottleneck facilities." That inconsistent Commission reasoning does not provide a rational basis upon which to support a proper finding regarding the existence of "bottlenecks." The Commission's finding must be accordingly rejected. See TURN v. CPUC at 540.

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[18] Decision at 67.

g. D.94-08-022 Contains Numerous Errors of Fact And Law Regarding Effects On Competition And Customers

The Commission's conclusions confuse the effects of increased competition with the effects of decreased scarcity value. For example, D.94-08-022 heavily relies on the Kwerel and Williams study[19] for the proposition that adding a third cellular carrier to the cellular market would reduce rates by 25 percent.[20] Such reliance ignores the fact that the central premise of the study is the addition of 18 MHz of cellular spectrum capacity by converting UHF television spectrum to cellular spectrum. Indeed, the very title of the paper, "Changing Channels: Voluntary Reallocation of UHF Television Spectrum" indicates the paper's thesis, which was to consider the social and economic benefits of adding a substantial quantity of capacity to the cellular market. What clearly drives the cellular service rate reduction predicted by Kwerel and Williams is the addition of capacity, not the mere number of competitors. Increasing supply while demand and other factors are constant will cause a reduction in prices. Thus, the Kwerel and Williams paper proves absolutely nothing about the relative impact on the level of competition of the absolute number of competitors

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[19] Kwerel, E.R. and Williams, J.R., Changing Channels: Voluntary Reallocation of UHF Television Spectrum, OPP Working Paper No. 27, Federal Communications Commission, November 1992.

[20] Decision at 49.

in the cellular market, nor about the competitive impact of resellers who do not independently provide any spectrum capacity in that market.

The Commission also cites "a study by Morgan Stanley" for the same proposition. However, the Commission provides no information as to what Morgan Stanley study it refers.[21] Since that study is apparently not part of the record, conclusions based on that study constitute error and must be discarded.[22]

h. The Commission Errs By Mischaracterizing Discount and Basic Rates Without Record Evidence

Although the Decision notes that for most classes of customers in most urban markets the best rates offered through discount plans were lower than those offered by the basic rate, the Commission, nevertheless, ignores the reality that cellular rates are decreasing through discounted rate plans and instead focuses on basic rates. That focus lead the Commission to compare percentage changes in nominal basic rates with percentage changes in real operating expense per subscriber, a comparison of apples to oranges. The comparison is invalid because the real operating costs have already been lowered to reflect inflation, whereas the

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[21] Decision at 49.

[22] If the Commission intended to refer to the 1991 Morgan Stanley Report upon which it later relied for a different proposition, the material would still not be appropriate for the record. The 1991 Morgan Stanley Report, (See Decision at 65 and Findings of Fact 47) is itself not part of the record, as that report was itself merely cited in a study which, in turn, was cited in comments submitted in this Investigation.

nominal prices have not been so adjusted. The second price-cost comparison used by the Commission, nominal basic rates to change in capital investment per subscriber, is also meaningless. Capital investment is related to the number of subscribers the carrier expects to have in the future (and the stock of capital equipment in place today), not the number of subscribers today, for whom past investments were made. Comparing the two only confuses the issue of whether prices have fallen.

The Decision also states "it is questionable as to how much discount plans really lower overall costs of service in any event." Decision at 48. The Commission concludes that the appropriate price comparison to gauge cellular rate reductions is between the total package of terms and conditions applicable to each payment plan under which the customer receives service. Decision at 48. Fair enough. However, this comparison is clearly a factual issue which warrants evidentiary hearings. The Commission presents no evidence of its own with which to make such a comparison, and did not permit other parties the opportunity to offer such evidence in a hearing. Absent the necessary data, the Commission's conclusions are based on flawed assumptions and lack any evidentiary support.

i. D.94-08-022 Draws Erroneous Conclusions Regarding Carrier Earnings

The CPUC cites data on accounting rates of return and the value of the "Q ratio"[23] for cellular carriers in support of its claims that the carriers are earning excessive profits.[24] In explaining why it finds returns excessive, the Commission discusses the scarcity value of the spectrum allocated to cellular service, as well as issues relating to capacity utilization and expansion. However, the data on carrier's accounting rates of return cited by the CPUC contain no information about whether the carriers possess or are excising market power. First, accounting rates of return are not good proxies for economic rates of return, the measure of profit relevant to the issue of monopoly.[25] Second, the accounting rates of return the Commission cites omit the opportunity cost of holding scarce electromagnetic spectrum, thus dramatically overstating the profitability of the cellular carriers.

Furthermore, the Commission failed to appreciate the distinction between the scarcity rents and monopoly rent. While the Commission acknowledges this distinction in principle, it

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[23] The Q ratio is defined as a financial valuation index that measures the relationship of a firms's (or industry's) capital market value in relation to the replacement cost of its assets. (Decision at 50.)

[24] Decision at 64-65.

[25] See Reply Comments of The Cellular Carriers Association Of California (CCAC Reply Comments) dated March 18, 1994, at pp. 27-31 submitted in the instant Investigation. See also Franklin M. Fisher and John J. McGowan, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits," 73 American Economic Review (March 1983) 82-97, cited in CCAC Reply Comments at 28.

effectively dismisses spectrum value from its analysis by asserting that spectrum scarcity is not the only, or the primary, determinant of license value. Decision at 56-60.

j. D.94-08-022 Disregards The Commission's Own Prior Findings

The Commission boldly misconstrues its own prior findings when it asserts"...we conclude that the wholesale cellular telephone market currently remains uncompetitive." Decision at 2. (Emphasis added). The Commission repeats that revisionist version of cellular history when it states "we conclude that the cellular sector of the mobile services market continues to be uncompetitive which has perpetuated unreasonably high rates." Decision at 5. Notwithstanding those statements, the Commission has never before concluded that the cellular market was uncompetitive. That it now "remains uncompetitive" points to either a misunderstanding of its prior decisions, or a strong current of bias. The latter conclusion grows more plausible in light of other assertions contained in D.94-08-022. For example, the Decision gratuitously states:

> We are firmly committed to maintaining the requisite oversight to discourage firms from exercising excessive market power or attempting to defraud the public.

D.94-08-022 at 3.

No issue of fraud on the part of carrier, resellers, or anyone else has been alleged in this proceeding. It is irrelevant, unnecessary and poisonous to raise it in the context of this decision. The Commission injects the same type of anti-cellular carrier bias when it raises the specter of predatory pricing--

though without a shred of evidence or follow up for the accusation. Decision at 74. Indeed, the very notion of predatory pricing (pricing below cost) seems wholly out of place given the Commission's concerns about rates which it believes are too high!

These assertions indicate either a gross misunderstanding of prior findings by the Commission, or a complete disregard for them. Either way, a decision predicated upon those baseless assertions should not be allowed to stand.

k. D.94-08-022 Relies On Non Public Information To Which No Party Could Reply

D.94-08-022 supports its conclusion that cellular carrier prices are uncompetitive with the following passage:

> We have analyzed the pricing data provided in response to the ALJ ruling, and conclude that it further corroborates our conclusion that cellular carriers' prices remain uncompetitive. Decision at 49.

Similarly, D.94-08-022 justifies its conclusion regarding the underulization of capacity in this fashion:

> Moreover, the data on capacity utilization submitted in response to the ALJ ruling in this proceeding further corroborate that capacity remains available to expand the cellular customer base. Decision at 59.

How can a party reasonably respond to or even understand the Commission's reasoning and interpretation of this pricing and capacity utilization data? The answer is, it cannot be done. Parties are asked to accept on blind faith the Commission's conclusion that the pricing and capacity utilization data provided to the Commission on a confidential basis actually does corroborate the Commission's conclusion. Blind faith, however, is not the

appropriate judicial standard by which Commission decisions are reviewed. The Decision must afford a rational basis upon which parties may fully understand the Commission's reasoning. Greyhound Lines, supra. The Commission provides only a stark conclusion with no supporting rationale regarding its interpretation of the non-public pricing and capacity utilization data. Yet no one but the Commission could even comment on the data since it was obtained by the Commission after the public's opportunity to comment had expired. Furthermore, the public could not comment on the Commission's interpretation of the pricing data because that data was proprietary and confidential. Indeed, the ALJ Ruling of August 8, 1994 in this Investigation recognized the harm which would stem from public disclosure of the data and afforded much of the data protection from disclosure.[26] The Commission must rely on findings of fact and conclusions of law properly supported by evidence in the record, and must afford parties the opportunity to heard. (CTA, supra.) The Commission's reliance on the non-public confidential information violates both those tenets and should accordingly be discarded.

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[26] ALJ Ruling Dated August 8, 1994 at 4 and 7.